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No. ——

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

CATHERINE INGLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

REX DARRELL BERRY
Counsel of Record
DAVIS GRIMM PAYNE
MARRA & BERRY
1111 Third Avenue, Suite 1865
Seattle, WA 98101
(206) 447-0182

DAVID E. NAGLE
LECLAIR RYAN
707 E. Main Street, 11th Floor
Richmond, Virginia 23219
(804) 343-4077
Attorneys for Petitioner
Circuit City Stores, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS FOR REVIEW

1. Whether the Ninth Circuit erred in dismissing the appeal in this action on jurisdictional grounds, based on the Ninth Circuit's recent decision in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1379), which held, directly contrary to every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

2. Whether the Ninth Circuit erred in dismissing the appeal in this action on jurisdictional grounds, based on the Ninth Circuit's recent decision in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1379), which held, contrary to this Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), and the liberal federal policy favoring arbitration agreements, that any agreement to arbitrate between an employer and an employee constitutes an "employment contract" excluded from coverage under the Federal Arbitration Act?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City Group common stock tracks the performance of Circuit City, while CarMax Group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax Group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 2000. In the alternative, Circuit City requests summary reversal of the Ninth Circuit's Order.

Related petitions for writs of certiorari recently were filed with this Court in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378) and *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1379). This case, along with *Adams* and *Ahmed*, all present similar issues for review; i.e., the proper

scope of the Federal Arbitration Act ("FAA") Section One exclusion, and the proper definition for purposes of the FAA Section One exclusion of the term "contracts of employment." 9 U.S.C. § 1 (1994). The primary difference between this case and the *Adams* and *Ahmed* cases lies in their procedural posture. In *Adams* and *Ahmed*, the Ninth Circuit reversed the district courts' grant of separate petitions to compel arbitration, based on its broad reading of the FAA Section One exclusion and broad definition of "contracts of employment." The Ninth Circuit held that the FAA did not apply, as a matter of substantive law, to Circuit City's petitions to compel arbitration, leaving the district courts without authority to compel arbitration. *Adams*, 194 F.3d at 1071-72; *Ahmed*, 195 F.3d at 1133. Here, based on its prior ruling in *Adams* that the FAA did not apply, the Ninth Circuit dismissed Circuit City's appeal of a district court decision declining to compel arbitration, finding a lack of appellate jurisdiction. Circuit City had appealed pursuant to Section 16 of the FAA, 9 U.S.C. § 16 (1994), which provides independent appellate jurisdiction for immediate appeal from decisions adverse to arbitration. Thus, the same error (an erroneous interpretation of the FAA Section One exclusion) has manifested itself in two different ways, both of which deny to Circuit City the substantive rights and procedural mechanisms guaranteed by the FAA.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, which order is here sought to be reviewed, is unreported and reprinted here as Appendix A. The Order of the United States District Court for the Southern District of California denying Circuit City's motion to compel arbitration is unreported and reprinted here as Appendix B.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on January 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> *Section One* "[C]ommerce," as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> * * *
>
> *Section Three* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
>
> *Section Four* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Section Sixteen (a) An appeal may be taken from –

(1) an order -

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

9 U.S.C. §§ 1, 3, 4, 16 (1994).

STATEMENT OF THE CASE

On September 9, 1996, Respondent Catherine Ingle ("Ingle") executed an arbitration agreement as part of her application for employment. See Declaration of Pamela G. Parsons, ("Parsons Decl."), Exhibit A.[1] Following a period of employment, on June 21, 1999, contrary to the terms of the arbitration agreement, Ingle sued Circuit City in the United States District Court for the Southern District of California, U.S.D.C. Case No. 99-CV-1297S-JFS, pursuant to 28 U.S.C. § 1332(a) (1994 & Supp. III 1997), for a variety of employment-related legal claims. In response, Circuit City moved to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA"). On September 22, 1999, the district court entered an Order denying Circuit City's motion to compel arbitration. See Appendix B.

Pursuant to 9 U.S.C. § 16(a)(1) (1994), Circuit City appealed the denial of the motion to compel arbitration to the United States Court of Appeals for the Ninth Circuit.[2] In response,

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[1] The materials cited herein all are contained in the record on appeal with the Ninth Circuit Court of Appeals. Should this Court grant review, that record will be transmitted to this Court. *See* SUP. CT. R. 16.2. No "excerpt of record" cites are available because the Ninth Circuit dismissed Circuit City's appeal prior to the filing of an Excerpt of Record. *See* Ninth Circuit Rule 17-1.

[2] Section 16 of the FAA provides a jurisdictional basis for direct appeal to a United States Court of Appeals of orders denying motions to compel arbiration. *See* 9 U.S.C. § 16 (1994). This mechanism permits a party seeking arbitration to obtain immediate appellate review of a decision adverse to arbitration. *Id.* This right to immediate appeal fosters the strong public policy favoring arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (recognizing strong federal policy favoring arbitration).

Ingle filed a motion to dismiss Circuit City's appeal, asserting a lack of federal appellate jurisdiction. Ingle argued that the FAA did not apply, and thus no jurisdictional basis existed for Circuit City's appeal. The Ninth Circuit granted Ingle's motion and dismissed Circuit City's appeal for lack of jurisdiction. See Appendix A. The Ninth Circuit based this holding on its prior decisions in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam) and *Circuit City Stores, Inc.* v. *Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1379).

As background, in both *Craft* and *Adams*, the Ninth Circuit held, contrary to every other federal appellate court in the United States, that the statutory exclusion found at Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), must be read broadly to exclude coverage of all contracts of employment. *See Craft*, 177 F.3d at 1094; *Adams*, 194 F.3d at 1070 (citing *Craft*). Further, in *Adams*, the Ninth Circuit expanded its holding in *Craft* by finding that the same arbitration agreement currently before this Court was a "contract of employment," for purposes of placing the agreement within the FAA Section One exclusion. *See Adams*, 194 F.3d at 1071 ("[T]he [arbitration] agreement was a condition precedent to [Adams's] employment, [and thus,] was an employment contract, rendering the FAA inapplicable.").[3] *Id.* at 1072. In this case,

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[3] The holding in *Adams* appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), *petition for cert. filed*, 68 U.S.L.W. 3536 (U.S. Feb. 16, 2000) (No. 99-1378), the companion case to *Adams* in which a writ of certiorari also has been sought. In *Ahmed*, the Ninth Circuit found the arbitration agreement at issue to be an "employment contract" even though

based on the views articulated in *Craft* and *Adams* of (1) the scope of the FAA Section One exclusion and (2) what constitutes a "contract of employment," the Ninth Circuit concluded that the FAA did not apply to the appeal before it, and dismissed the appeal for "lack of jurisdiction." See Appendix A.

The arbitration agreement at issue here arises out of Circuit City's implementation in March 1995 of an "Associate Issue Resolution Program" ("AIRP"). Following implementation of the AIRP, prospective applicants are required, as part of the job application process, to execute a document entitled "Circuit City Dispute Resolution Agreement" ("DRA") by which they agree to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator." See Parsons Decl., Ex. A, p. 5 (emphasis in original). Prospective applicants for employment with Circuit City must agree to the terms of the DRA in order to have an application for employment considered. *Id.* A prospective applicant may withdraw his or her agreement to arbitrate within three days of execution by withdrawing his or her application for employment. See Parsons Decl., Ex. A, pp. 5-6.

The arbitration agreement is a separate, stand-alone agreement between the prospective applicant and Circuit City, entered into as part of the application process. The obligation to arbitrate exists independently of the employment relationship,

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the court expressly found that participation in the arbitration program was "voluntary," and expressly held that participation in the arbitration program was "*not* a condition precedent to employment." *Id.* at 1133 (emphasis added).

and applies before, during and after employment. See Parsons Decl., Ex. A, p. 6. The arbitration agreement specifically disclaims any status as an employment contract. See Parsons Decl., Ex. A, p. 5 ("I understand that neither this agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me.").[4]

REASONS FOR GRANTING REVIEW

I. THE NINTH CIRCUIT'S DISMISSAL ON JURISDICTIONAL GROUNDS WAS BASED ON A BROAD READING OF THE FAA SECTION ONE EXCLUSION WHICH CREATES AN INTOLERABLE CONFLICT AMONG THE LOWER COURTS.

In this case, by holding that it lacked federal appellate jurisdiction over Circuit City's appeal, the Ninth Circuit has extended the error made in its previous decision in *Adams*, 194 F.3d at 1071-72. There, the Ninth Circuit held that the exclusion found in Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C §1 (1994), must be read broadly to encompass all "labor or employment contracts." *Adams*, 194 F.3d at 1072 (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999)). This interpretation of the FAA Section One exclusion directly conflicts with every other United States Court of Appeals. The Ninth Circuit has applied this interpretation here to dismiss an appeal filed pursuant to Section 16 of the FAA, 9 U.S.C. § 16 (1994), based on its conclusion that the FAA is inapplicable to

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[4] The Dispute Resolution Rules and Procedures contain the rules and procedures governing arbitrations conducted pursuant to the parties' agreement to arbitrate. See Parsons Decl., Ex. B.

the arbitration agreement at issue here. The common basis for the decisions in this case, *Craft*, and *Adams* also conflicts directly with the decision of a state court of last resort within the geographic area covered by the Ninth Circuit. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996). Finally, the Ninth Circuit's decisions in this case, *Craft* and *Adams* raise an important issue not settled by the Supreme Court, which in fact expressly has been reserved by this Court.[5]

Thus, in the Ninth Circuit's view, no agreement to arbitrate disputes entered into by an employer and an employee may be enforced pursuant to the FAA. *See Adams*, 194 F.3d at 1070. Further, based on this case, no appeal may be maintained before the Ninth Circuit pursuant to the jurisdiction granted by Section 16 of the FAA for the same reasons. See Appendix A.

This extreme position manifests itself in many ways. In *Adams* and its companion case, *Ahmed*, the Ninth Circuit found as a matter of substantive law that the FAA did not apply to arbitration agreements between Circuit City and its Associates. As a result, the Ninth Circuit held that a federal district court lacked "federal authority" to compel arbitration pursuant to the FAA, and reversed the orders of the district courts compelling arbitration. *See Adams*, 194 F.3d at 1072; *Ahmed*, 195 F.3d at 1133. Here, the same flawed analysis has a different, but equally significant impact, removing the jurisdictional basis for Circuit City's appeal to the Ninth Circuit of a district court

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[5] This Court previously has reserved the question of the proper scope to be given to the FAA Section One exclusion. *See Gilmer*, 500 U.S. at 25 n.2 (1991) (Court "leave[s] for another day the issue raised by amici curiae" as to proper scope of the FAA Section One exclusion). This question was reserved over the dissent of Justice Stevens and Justice Marshall. *Id.* at 36. As in *Gilmer*, the arbitration program at issue here also is not part of a "contract of employment." *See infra* Section II.

order denying Circuit City's motion to compel arbitration pursuant to the FAA. See Appendix A.

However, this broad reading of the FAA Section One exclusion by the Ninth Circuit directly conflicts with *every* other federal appellate court. Rather, every other United States Court of Appeals has found the FAA Section One exclusion to be narrow, applying only to employment contracts of seamen, railroad workers, and other employees actually engaged in the movement of goods in interstate commerce. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of [FAA] Section 1."); *Great Western Mortgage Corp.* v. *Peacock*, 110 F.3d 222, 227 (3d Cir.), *cert. denied*, 522 U.S. 915 (1997) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this Section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of

goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers . . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that Section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA Section One exclusion "accords with the statute's text and history."); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA only excludes from the provisions of the Act the employment contracts of workers engaged in the transportation of goods in commerce.").

Further, since the Ninth Circuit decided *Craft*, the Seventh Circuit has considered and expressly disagreed with *Craft*. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999) ("We acknowledge that our finding of jurisdiction [under the FAA] is in disagreement with the Ninth Circuit, which recently held that all contracts of employment are outside the scope of the FAA. However, other circuits which have addressed this issue have concluded, as we have, that such employment contracts are not excluded from the purview of the FAA.") (citations omitted).

Thus, the Ninth Circuit stands alone in its view that the FAA Section One exclusion reaches all contracts of employment. In

contrast, the more logical view is that when drafting the FAA Section One exclusion, Congress had in mind specific transportation workers for whom special arbitration legislation already existed. In *Tenney Eng'g, Inc. v. United Elec. Radio and Mach. Workers of Am.*, 207 F.2d 450 (3d Cir. 1953), the Third Circuit Court of Appeals analyzed the scope of the FAA Section One exclusion. Considering the text of the statute as well as the legislative history, the court concluded that when the FAA originally was drafted in 1925, Congress was aware that statutory arbitration mechanisms already existed for seamen (46 U.S.C. § 651)[6] and railroad employees (Railway Labor Act § 7, 45 U.S.C. § 157 (1994 & Supp. III 1997)). *See Tenney*, 207 F.2d at 452, nn.7-8; *see also Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (finding FAA Section One exclusion to have been added by Congress to overcome objections of Seamen's Union). In the Third Circuit's view, the addition of language by Congress regarding "any other class of worker engaged in foreign or interstate commerce" was intended:

> to include only those other classes of workers who are likewise engaged directly in commerce . . . . The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Tenney, 207 F.2d at 452-53.

As a result of the Ninth Circuit's solitary position, an intolerable conflict is presented. Specifically, employers within

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[6] The seamen arbitration statute in effect when the FAA was drafted later was repealed, *see* Pub. L. 98-89, Aug. 26, 1983, leaving to seamen other statutory dispute resolution procedures. *See, e.g.*, 46 U.S.C. § 10302(b) (1994).

the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington now are precluded from relying on the FAA as a jurisdictional basis for appeal when a federal court declines to enforce arbitration agreements with employees who are not transportation workers. However, employers and employees in forty-one other states and Puerto Rico may obtain precisely that relief.

Only in the Ninth Circuit are employers denied the right to immediate federal appellate review of a lower court decision adverse to arbitration. This statutory right is consonant with the strong federal policy favoring arbitration. Specifically, when enacting the appeal provisions of the FAA, Congress recognized the inherent risk of irreparable injury to a party who, upon a court's denial of a petition to compel arbitration, must then proceed to litigate a lawsuit without the opportunity for immediate appellate review of that decision. In such cases, the entire benefit of the arbitration agreement is lost, rendering appellate reversal of a decision adverse to arbitration a hollow victory. Congress thus authorized *immediate* appeals of orders denying motions to compel arbitration brought pursuant to the FAA. *See* 9 U.S.C. §16(a)(1) (1994). In *Stedor Enters., Ltd. v. Amtex, Inc.*, 947 F.2d 727 (4th Cir. 1991), the Fourth Circuit noted that the "broad purpose of Section 16 was to implement Congress' 'deliberate determination that appeal rules should reflect a strong policy favoring arbitration.'" *Id.* at 730 (quoting 15 Charles A. Wright, et al., *Federal Practice and Procedure* § 3914.34 at 412 (Supp. 1990)). In *Stedor*, the Fourth Circuit highlighted the concern that a party will be irreparably injured if forced to litigate while appealing the denial of a motion to compel arbitration:

> [A]n order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration; refuses to compel arbitration; denies confirmation to or

> modifies, corrects or vacates an arbitral award; or grants, continues, or modifies an injunction against arbitration—is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. § 16(a)(l) and (2). *Thus, a party who believes that arbitration is required by an agreement between the parties need not suffer the expense and inconvenience of litigation before receiving appellate review of a district court judgment that arbitration was inappropriate.*

Id. (emphasis added). Here, by denying Circuit City's right to an immediate appeal of the denial of a petition to compel arbitration, the Ninth Circuit would require Circuit City and all employers to "suffer the expense and inconvenience of litigation before receiving appellate review" of the matter at issue. *Id.*

These conflicts present a predicament for large national employers like Circuit City, with operations both within and outside the geographic area covered by the Ninth Circuit. Such employers who use the same arbitration agreement for their entire workforce now are barred from seeking enforcement of arbitration agreements pursuant to the FAA in federal courts within the Ninth Circuit, while such relief is available outside the Ninth Circuit. Likewise, the right to immediate appellate review is lost within the Ninth Circuit. As a result, the Ninth Circuit's position creates an intolerable conflict affecting thousands of employers and many hundreds of thousands of employees.

This conflict is not simply hypothetical, but actually exists for the petitioner. Two other federal courts of appeals have reviewed the same arbitration program under the FAA. In *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998), the Fourth Circuit recognized that "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* at 377 (citing *Gilmer*,

500 U.S. at 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

Subsequently, in *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999), the Seventh Circuit Court of Appeals considered Circuit City's appeal of a district court's order denying a motion to compel arbitration under the arbitration agreement at issue here. *Id.* at 637. Directly contrary to the Ninth Circuit, the Seventh Circuit expressly found a jurisdictional basis for the appeal in Section 16 of the FAA. *Id.* at 635 ("[W]e find jurisdiction for this appeal under section 16(a)(1)(C) of the [FAA], which provides that an appeal may be taken from an order denying a motion to compel arbitration.") (citations omitted). Neither the Fourth nor Seventh Circuits found the agreement to arbitrate to be an "employment contract." Neither court found any other jurisdictional bar to considering the appeal before it.

Finally, the Ninth Circuit's view of the scope of the FAA Section One exclusion also directly conflicts with that of the Supreme Court of Hawaii, located within the Ninth Circuit's geographic area. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996) ("[W]e believe that the narrow interpretation of the section 1 exclusion is correct . . . ."). Thus, employers and employees in Hawaii, including Circuit City, seeking enforcement of arbitration agreements under the FAA are faced with directly conflicting interpretations of the FAA, depending on whether they seek to compel arbitration in state or federal court. A definitive ruling by this Court as to the proper scope of the FAA Section One exclusion will remove these intolerable conflicts.

II. THE NINTH CIRCUIT'S DISMISSAL ON JURISDICTIONAL GROUNDS WAS BASED ON A BROAD VIEW OF WHAT CONSTITUTES AN "EMPLOYMENT CONTRACT" FOR PURPOSES OF THE FAA SECTION ONE EXCLUSION WHICH CREATES AN INTOLERABLE CONFLICT WITH SUPREME COURT AUTHORITY.

Review of the Ninth Circuit's decision is warranted for a second and separate reason. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly declined to address the issue of the appropriate scope of the FAA Section One exclusion because the arbitration agreement presented there was contained in a securities industry "U-4" registration form ("Form U-4"), required as a condition precedent to working as a broker in the securities industry, rather than in an employment contract. *Id.* at 25 n.2. As a result, the clear direction from this Court is that, regardless of the "broad" or "narrow" scope of the FAA Section One exclusion, arbitration agreements which are not "contracts of employment" are not excluded from coverage by the FAA. *Id.* Thus, if the arbitration agreement at issue here is not a "contract of employment," the FAA Section One exclusion would not preclude application of the FAA, which would in turn leave intact the vehicle for immediate appellate review found in Section 16 of the statute. *See* 9 U.S.C. § 16 (1994).

Like the arbitration agreement in a securities registration application in *Gilmer*, 500 U.S. at 25 n.2, this arbitration agreement is not contained in a contract of employment, and accordingly, the exclusionary language of FAA Section One cannot apply. Specifically, in *Gilmer*, prospective licensees under the Form U-4 were required to agree to arbitrate employment-related legal claims against their employer as a condition precedent to employment. *Id.* at 25 n.2. Likewise,

prospective applicants for employment with Circuit City must agree to arbitrate employment-related legal disputes in order to have their applications considered by Circuit City. See Parsons Decl., Ex. A, p. 5. Both agreements establish the obligation to arbitrate, but have no further impact on setting the terms and conditions of employment. *Id.* Neither agreement sets the wages, hours, working conditions, period of employment or various other terms normally found in an employment contract. *Id.* In fact, the arbitration agreement executed by Ingle specifically disclaims any status as an employment contract. See Parsons Decl., Ex. A, p. 5 ("I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me . . . . If Circuit City does accept my application for employment and I become employed at Circuit City, this Agreement in no way alters the 'at-will' status of my employment."). By its own terms, then, the arbitration agreement is not an employment contract. Rather, like the Form U-4, the arbitration agreement is a separate, stand-alone agreement by which Ingle agreed to arbitrate any and all employment-related legal disputes in exchange for Circuit City's agreement to consider her application for employment. Furthermore, the arbitration agreement is not a "contract of employment" because it applies not only to applicants who ultimately are hired by Circuit City, but also to unsuccessful applicants, who never become employed by the Company. *See Johnson v. Circuit City*, 148 F.3d 373, 378 (4th Cir. 1998) (finding adequate consideration for the arbitration agreement even though applicant was never hired by Circuit City).

Thus, even if the Ninth Circuit is correct (and every other federal court of appeals is wrong) in its broad reading of the scope of the FAA Section One exclusion, the decision that Ingle's agreement to arbitrate falls within the FAA Section One

exclusion as a "contract[] of employment," still conflicts with this Court's opinion in *Gilmer, supra*, and with the "liberal federal policy favoring arbitration agreements" reflected in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

III. THE NINTH CIRCUIT'S DECISION IS AN ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY.

The Ninth Circuit's erroneous interpretations of (1) the scope of the FAA Section One exclusion, and (2) what constitutes a "contract of employment," have a serious and immediate impact on thousands of employers and employees. For example, Circuit City is a national company employing approximately 60,000 Associates. The Company has approximately 10,000 Associates employed in the nine states within the Ninth Circuit. If the Ninth Circuit's decision is permitted to stand, Circuit City will be in the untenable position of being permitted to move to compel arbitration pursuant to the FAA in every court except those under the authority of the Ninth Circuit. Circuit City also will be denied only in the Ninth Circuit its statutory right to immediate appellate review of a decision adverse to arbitration.

This serious and immediate impact is not limited to Circuit City, but is shared by all businesses that employ persons both within and outside the geographic scope of the Ninth Circuit. The Ninth Circuit's erroneous rulings present for them the same intolerable conflict.

Moreover, employers who operate solely within the nine states covered by the Ninth Circuit now are deprived completely of their federal statutory right to seek enforcement in federal court of agreements to arbitrate employer-employee disputes, including the right to immediate appellate review of any decision adverse to arbitration; rights expressly granted to

them by Congress when enacting the FAA, *see* 9 U.S.C. §§ 3, 4, 16 (1994), and recognized by this Court. *See Gilmer*, 500 U.S. at 24-25. By contrast, their counterparts in forty-one other states may pursue this relief, including immediate federal appellate court review of orders denying motions to compel arbitration, which specifically is provided by the FAA. 9 U.S.C. §16 (1994).

Lastly, the Ninth Circuit's view is that any agreement requiring arbitration of disputes between employers and employees is a "contract of employment" excluded from coverage by the FAA. In contrast, employers and employees outside the Ninth Circuit with such agreements are not deprived of the statutory protections and procedures available in the FAA, including immediate appellate review. *Id.* By granting certiorari on the issues presented, this Court can remove the conflict currently existing and ensure a nationally uniform interpretation of the FAA's Section One exclusion.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to granting this Petition, Circuit City respectfully requests summary reversal of the Ninth Circuit's decision in this case.

Respectfully submitted,

REX DARRELL BERRY
Counsel of Record
DAVIS GRIMM PAYNE
MARRA & BERRY
1111 Third Avenue, Suite 1865
Seattle, Washington 98101
(206) 447-0182

DAVID E. NAGLE
LECLAIR RYAN
707 East Main Street, 11th Floor
Richmond, Virginia 23219
(804) 343-4077

Attorneys for Petitioner
Circuit City Stores, Inc.

April _, 2000

APPENDICES

APPENDIX A

[Filed Jan. 24, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 99-56570

CATHERINE INGLE,

Plaintiff-Appellee,

v.

CIRCUIT CITY,
a Virginia corporation,

Defendant-Appellant.

ORDER

Before: BEEZER, O'SCANNLAIN and THOMAS, Circuit Judges.

Appellee's motion to dismiss this appeal for lack of jurisdiction is granted. *See Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999); *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1093 (9th Cir. 1998). Accordingly, the appeal is dismissed.

All pending motions are denied as moot.

DISMISSED.

APPENDIX B

[Entered: Sept. 22, 1999]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT, CALIFORNIA

Case No. 99 CV 1297S JFS

CATHERINE INGLE,

Plaintiff,

v.

CIRCUIT CITY, a Virginia corporation; and DOES 1 through 100,

Defendants.

This matter came before the Court on August 30, 1998, at 10:30 a.m., on Defendant CIRCUIT CITY's motion to compel Plaintiff CATHERINE INGLE to arbitrate her claims against CIRCUIT CITY. Michael H. Crosby appeared for plaintiff and Rex Darrell Berry and Richard Paul appeared for defendant. The Honorable Edward J. Schwartz presided. For the reasons set forth below, Defendant's motion to compel arbitration is DENIED.

Defendant's form application for employment conditioned plaintiff's employment on her agreement to forego statutory rights and remedies, and so the provisions purporting to require her to arbitrate statutory state and federal employment claims were unenforceable. *See Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

For the reasons set forth above, Defendant's motion is DENIED.

Dated Sep., 21 1999

/s/ Edward J. Schwartz
United States District Judge

APPROVED AS TO FORM

/s/ Michael J. Crosby
Attorney for Plaintiff
Catherine Ingle

/s/ Rex Darrell Berry
Attorney for Defendant
Circuit City

FILED
MAY 15 2000
CLERK

(2)

No. 99-1648

In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

CATHERINE INGLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL H. CROSBY
Counsel of Record
D.F. Garrettson House
2366 Front Street
San Diego, California 92101
(619) 696-7330

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION TO OPPOSITION

Respondent Catherine Ingle ("Respondent" or "Ms. Ingle") opposes the Petition for Writ of Certiorari for the reasons stated in the Brief in Opposition No. 99-1379, *Circuit City Stores, Inc. v. Saint Clair Adams*. Respondent joins with Mr. Adams in urging this Court that, should the Petition be granted, *certiorari* review be limited to the First Question Presented by Circuit City Stores, Inc. ("Petitioner" or "Circuit City").

Ms. Ingle also raises the following distinct reasons why certiorari should not be granted to review the dismissal of Circuit City's appeal in her case.

II. NO JURISDICTIONAL AUTHORITY

Ms. Ingle's lawsuit was brought in federal court. Mr. Adams and Mr. Ahmed, on the other hand, brought their lawsuits in state court. The issue of federal court jurisdiction arose in those two cases when Circuit City brought original petitions to stay state court litigation and compel arbitration of the disputes. This Petition arises from an order of the United States District Court, Southern District of California, denying petitioner's motion to compel arbitration. Circuit City filed a notice of its intent to appeal the interlocutory order. Its appeal was dismissed.

The order for which review is sought in this case is interlocutory, not final. The orders questioned in *Adams* and *Ahmed* are *final orders* dismissing petitions to compel

arbitration. See Civil Rule 54(b). In *Ingle*, jurisdiction never passed from the District Court and remains there today. See *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). The appellate courts recognize the jurisdictional distinction. See *Matter of Arbitration Between Chung and President Enterprises*, 943 F.2d 225, 227-229 (2d Cir. 1991).

Due to the absence of finality and District Court's uninterrupted jurisdiction over the subject matter, this Court's jurisdiction over the matter is questionable, at best.

III. FACTUAL BACKGROUND

Ms. Ingle applied for the position of sales associate at Circuit City in September 1996. At the time of application, she was given forms and told where to sign. Ingle was not given an opportunity to read the forms she was told to sign. She was never offered the opportunity to "opt-out" of the compulsory arbitration program.[1]

Ms. Ingle was not shown any dispute resolution rules; no one in management explained them to her. She never saw the rules discussed as Petitioner's Exhibit B at any time she worked on the job nor was she advised of any changes in the rules.

Ms. Ingle twisted her back at work helping to transport a wide-screen television in December 1997. Her

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[1] Due to the absence of an appellate record, the facts stated are based upon facts stated in the complaint and declarations of Catherine Ingle and Michael Crosby (and exhibits to that declaration) filed in support of the opposition to motion to compel arbitration.

supervisor, whose sexual advances toward Ms. Ingle approached stalking, was angry that she rejected him. When Ms. Ingle returned to work in January 1998, she presented Anderson with a doctor's written instructions that her work hours and lifting be limited strictly. Anderson, though, assigned her to work up to 60 hours a week, with heavy lifting. Ms. Ingle reported the harassment to store manager Eric Gibbs. His statements, actions and inactions caused far greater damage, so Ms. Ingle reported the harassment to Circuit City through its "cool-line" and by contacting its Western Regional Manager. No one at Circuit City responded to this report by informing Ms. Ingle of the dispute resolution rules. No one gave her a claim form to file.

Ms. Ingle retained an attorney, her counsel of record. Circuit City's in-house attorney sent a copy of its purported dispute resolution rules in mid-April 1998. Ms. Ingle's counsel contacted the two leading alternative dispute resolution providers in San Diego, J.A.M.S./ Endispute ("J.A.M.S.") and the American Arbitration Association ("AAA"). He provided them with copies of Circuit City's arbitration agreement and rules. He inquired whether either firm would administer an arbitration under those rules.

J.A.M.S. cited "*Duffield*" and "other factors" to explain its decision not to administer the case. J.A.M.S. sent its governing policy and rules, "J.A.M.S./Endispute Policy on Employment Arbitration Minimum Standards of Procedural Fairness."

AAA stated firmly that it would arbitrate the Ingle/ Circuit City dispute only if the parties stipulated to be

governed by AAA's "National Rules for the Resolution of Employment Disputes." In May 1998 and again in July 1999, Ms. Ingle offered to arbitrate under those rules. Circuit City refuses to do so.

IV. PROCEDURAL HISTORY

Plaintiff filed her Complaint for Sexual Harassment [California Government Code ("Gov.C.") § 12940(h)]; Failure to Prevent Sexual Harassment [Gov.C. § 12940(i), (h)(3)]; Unlawful Employment Discrimination on the Basis of Gender or Physical Handicap [Gov.C. § 12940(a)]; Retaliation for Protesting Sexual Harassment [Gov.C. § 12940(f)]; Failure to Reasonably Accommodate Physical Handicap [Gov.C. § 12940(k)]; Gender Discrimination and Harassment [42 U.S.C. § 2000e]; Retaliation for Reporting Employment Discrimination [42 U.S.C. § 2000e] on June 21, 1999.[2] Defendant filed a motion to compel arbitration on July 16, 1999. The motion was based in part on the Declaration of Pamela Parsons and Exhibits A and B thereto. Plaintiff filed her response on August 16, 1999. The opposition was supported by declarations by Michael Crosby (with exhibits) and Catherine Ingle.

The motion was heard and denied by the late Honorable Edward J. Schwartz on August 30, 1999. (Transcript of Hearing, 8/30/99, is Appendix 1.) A written order was signed on September 21, 1999 and entered September 22, 1999.

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[2] A prior, more limited version of this complaint (Case No. 99 CV 0181J JFS) was filed on March 3, 1999 and dismissed for lack of subject matter jurisdiction on May 24, 1999.

Defendant filed its notice of appeal on October 5, 1999. Respondent filed her motion to dismiss the appeal on November 19, 1999. The motion to dismiss was granted on January 24, 2000.

V. REASONS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. THIS *CASE* IS NOT RIPE FOR SUPREME COURT SCRUTINY

This case is not a promising candidate for review because no ruling by this Court will determine whether Ms. Ingle's dispute with Circuit City should be arbitrated. Judge Schwartz based his district court ruling entirely on the Ninth Circuit's opinion in *Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) [employer may not force employee to arbitrate employment discrimination claims as a condition of employment]. (See Appendix B to Petition; Appendix 1, pp. 20-22.) The ruling did not consider *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*) nor the issues addressed in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (*per curiam*) and *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (*per curiam*).

Even if this Court were to rule four-square in Circuit City's favor, it would only return the parties to the appellate court. The parties would have to designate a record, then brief the materially indistinguishable *Duffield* decision as well as Ms. Ingle's other challenges to enforcement of the "Associate Issue Resolution Program" ("AIRP"). The ultimate appellate decision will be in Ms.

Ingle's favor, as *Duffield* was a Ninth Circuit case. Certiorari review will prejudice Ms. Ingle by delaying resolution of her case on the merits without any likelihood that the ultimate ruling would be to compel arbitration.[3]

B. THIS *ISSUE* IS NOT RIPE FOR SUPREME COURT SCRUTINY

1. PETITIONER HAS OVERSTATED THE CONFLICT IN THE CIRCUITS SINCE AT LEAST THREE HAVE NOT YET STATED DECISIVE POSITIONS

Circuit City represents that "this broad reading of the FAA Section One exclusion by the Ninth Circuit directly conflicts with every other federal appellate court." (Petition, page 10.) This assertion, however, masks conflicts within three circuits.

In *United Food and Commercial Workers Local 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943-944 (10th Cir. 1989), the Tenth Circuit held that an employee could not confirm and enforce an arbitration award pursuant to the FAA because the arbitration agreement was part of a contract of employment. The court recognized that "[t]he Arbitration Act expressly excludes from its coverage 'contracts of employment of . . . any . . . workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1 (ellipse in

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[3] Circuit City would in fact have three separate appellate occasions to delay justice: the disposition of the issue presented here; a petition to review a subsequent Ninth Circuit decision that arbitration may not be compelled; and finally the decision on the merits of her harassment and discrimination claims.

original)." Nothing indicates that the employee, Cortez, was engaged in the actual movement of products in commerce. The *UFCW* holding was not addressed in *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998), a case cited by Petitioner. That opinion reads the FAA employment contract exclusion more narrowly.

The Fourth Circuit in *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064, 1067-1068 (4th Cir. 1993) noted a line of its cases that had excluded collective bargaining agreements, as "contracts of employment," from the FAA by force of Section One. Nonetheless, this precedent was ignored in *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997), and by Petitioner.

The Third Circuit in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1119-1120 (3d Cir. 1993) stated that " 'contracts of employment' are explicitly exempted from the FAA." A panel of the Third Circuit disavowed this view when it decided *Great Western Mortgage Corporation v. Peacock*, 110 F.3d 222, 226-227 (3rd Cir. 1997) and it was not mentioned by Petitioner.

2. RECENT SCHOLARLY EXCAVATIONS INTO CONGRESSIONAL RECORDS (DISCUSSED BY THE COURTS OF APPEAL IN *CRAFT* AND *KOVELESKIE*) PROVIDE NEW INSIGHT INTO CONGRESS'S INTENT AND UNDERSTANDING WHEN IT ENACTED THE RELEVANT STATUTORY PROVISIONS; THE ISSUE SHOULD PERCOLATE IN THE LOWER COURTS.

This Court would be better prepared to consider the issues presented in the Petition if it would allow these

circuits to clarify their respective constructions of Sections One and Two of the FAA. More specifically, as Mr. Adams reasoned in his Brief in Opposition, the recent scholarly research into the history of the FAA has only been considered by two courts, the Ninth in *Craft* and the Seventh in *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), *cert. denied*, 129 S.Ct. 44 (1999). Other courts should be permitted to evaluate the FAA in light of recent scholarship clarifying Congressional understanding and intent.

This Court prefers to exercise certiorari review only after an issue has been permitted to "percolate" through the lower courts. By allowing this issue to percolate, the remaining circuits (including those without settled positions) could then consider the new scholarship discussed in Mr. Adams' brief. The perceived conflicts may be resolved through this process. In any event, further consideration would distill and clarify the issue and focus this Court's review.

3. THERE IS NO FACTUAL AND DOCUMENTARY RECORD

The texts of the Petition and this Response highlight the logistical complications review would entail. The Petition's footnote 1 concedes the absence of any appellate record. Its citation to Rules of the United States Supreme Court ("Rule") 16.2 solves nothing. That rule merely directs this Court to request the record from "the court" having possession of it. Here, there are two courts but no record, only documents in files. The absence of an appellate record is a symptom of the malady: unripeness.

C. THE COURT OF APPEAL'S RULING DOES NOT INVOLVE *INTOLERABLE ERROR*

1. COURTS OF APPEAL SHOULD CONSTRUE FEDERAL JURISDICTION NARROWLY.

Circuit City's petition requests this Court to focus on the purported deprivation businesses will suffer if they cannot use 9 U.S.C. § 16 to appeal orders denying motions to compel their employees to arbitration. However, the issue is federal jurisdiction – whether original (as in *Adams* and *Ahmed*) or appellate (*Ingle*).

Federal courts are of limited jurisdiction which cannot be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). In fact, a matter is presumed to be *outside* a federal court's jurisdiction; the burden to establish federal jurisdiction falls upon the party asserting it. *Id.* For similar reasons, statutes purporting to bestow federal jurisdiction must be narrowly construed. See *Healy v. Ralta*, 292 U.S. 263, 270 (1934).

The Court of Appeal in *Craft* and its progeny, including this case, rules prudently and according to this Court's direction when it limits the statutory extension of federal jurisdiction. Its rulings to construe jurisdiction under the FAA narrowly, therefore, do not constitute intolerable error.

2. THE COURT OF APPEAL'S DISMISSAL IN THIS CASE IS NOT NECESSARILY BASED ON A "BROAD READING OF THE FAA SECTION ONE EXCLUSION"

Circuit City focuses its petition on the Court of Appeal's construction of 9 U.S.C. § 1, the "exclusionary" provision of the FAA. However, it overlooks the clearly stated basis for *Craft's* holding:

> "*Based on the wording of* § 2, the pre-New Deal understanding of the Commerce Clause, the legislative history of the FAA, and the suggestions gleaned from [*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)], we hold that the FAA does not apply to labor or employment contracts. . . . Accordingly, we have no jurisdiction over Campbell Soup's interlocutory appeal and this appeal is hereby DISMISSED." *Craft, supra*, 177 F.3d at 1094, emphasis added.

Craft is constructed specifically from the "coverage" provision of the Act, Section Two. The provision enforces written arbitration provisions "in any maritime transaction or a contract evidencing a transaction involving commerce. . . . " As Respondent discusses below, Circuit City chose to omit reference to this statute from its petition.

3. NO PUBLIC POLICY FAVORS MANDATORY ARBITRATION WHEN IMPOSED AS A CONDITION OF EMPLOYMENT BECAUSE SUCH AGREEMENTS ARE UNCONSCIONABLE AND UNENFORCEABLE

Petitioner relies heavily on the "strong liberal policy favoring arbitration." Congress certainly declared such a policy when it enacted the FAA. However, that policy extends only to the ground covered by the statute. The liberal policy arising from the FAA cannot be used as a bootstrap to drag uncovered transactions or contracts into the statute's coverage zone. See *Perry v. Thomas*, 482 U.S. 483, 489-490 (1987) ["Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2."].

a. THE DRA IS UNCONSCIONABLE

Circuit City's arbitration agreement, known as the Dispute Resolution Agreement ["DRA"] is unenforceable.[4] Respondent in her District Court memorandum of points and authorities in opposition to Circuit City's motion to compel arbitration identified numerous legal, factual and policy arguments why arbitration should not be compelled.

---

[4] Mr. Adams addresses the coverage issue in his Brief in Opposition, No. 99-1379.

Unconscionability is a common ground to revoke a contract or prove it invalid. The DRA contains so many limits on its employees' statutory rights that it is substantively unconscionable.[5] The manner by which the DRA was imposed on Ms. Ingle was procedurally unconscionable. The uncontroverted facts are that she wasn't allowed to read it and the document she saw at hiring in 1996 was different from the 1998 version Circuit City asks the federal courts to impose on her. A number of the deficiencies Ms. Ingle identified, particularly the requirement to "buy justice" have been held sufficient to invalidate arbitration agreements.

b. PUBLIC AND PRIVATE AGENCIES HAVE DENOUNCED COMPULSORY ARBITRATION OF EMPLOYMENT DISPUTES

Another indication that public policy disfavors mandatory arbitration as a condition of employment is that the Equal Employment Opportunity Commission ("EEOC") concluded, in EEOC Policy Notice No. 915:002, that "[t]he use of unilaterally imposed agreements mandating binding arbitration of employment discrimination

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[5] Respondent identified the following unfair provisions in her District Court opposition brief: (1) unfair cost to the employee/claimant; (2) improper time limits on back pay; (3) improper deductions from back pay; (4) improper time limits on front pay; (5) cap on punitive damage awards; (6) improper attorney's fee provision; (7) shortened statutes of limitation; (8) limits on discovery; (9) unfair provision to designate arbitrator; (10) limit on employee's access to court without limiting the company; and, of course, (11) no jury trial.

disputes as a condition of employment *harms both the individual* civil rights claimant *and the public interest* in eradicating discrimination." (Emphasis added.)

Respondent noted in her Brief that AAA and J.A.M.S. refused to arbitrate the Ingle/Circuit City dispute under terms of the DRA because as AAA's attorney wrote, Circuit City's DRA did not "substantially and materially conform their employment plan to the standards of the Due Process Protocol and the [AAA's] National Rules for the Resolution of Employment Disputes."

D. ADDITIONAL STATUTES INVOLVED; MISSTATEMENTS OF LAW AND FACT

Rule of the United States Supreme Court ("Rule") 15.1 instructs parties opposing certiorari to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted." Circuit City has misstated facts and law that could impact the nature of questions before the Court.

1. CIRCUIT CITY OMITTED ANY REFERENCE TO THE STATUTE *CRAFT* RELIED ON, 9 U.S.C. § 2

Circuit City has correctly identified four statutes implicated by the issues before the Court. However, it failed to identify 9 U.S.C. § 2, the "coverage provision" of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994). It is the wording of this provision that the per

curiam opinion in *Craft v. Campbell Soup Company*, 177 F.3d at 1091-1094 relied upon specifically in its holding that "the FAA does not apply to labor or employment contracts." (*Id.* at p. 1094.)

Section Two reads:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

No analysis of the FAA – what it covers and what it doesn't – can ignore Section Two.

2. PETITIONER STATES LEGAL AND FACTUAL ISSUES ARISING FROM QUESTION 2 INACCURATELY

a. THERE IS NO CONFLICT BETWEEN *ADAMS* AND *AHMED*

Circuit City's petition in its footnote 3 (page 6) suggests that the holding in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (*per curiam*) "appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (*per*

curiam)." It further suggests the Ninth Circuit was confused in its understanding of Circuit City's AIRP, specifically, whether it was compulsory or voluntary. A full explication of the facts demonstrates that the Ninth Circuit accurately perceived the legally significant distinctions between the circumstances in *Adams* and *Ahmed*.

Circuit City relates at page 7 that its AIRP was implemented in *March 1995*, that Mr. Ahmed was employed at that time, and that in April 1995 he received material giving him the choice to "opt-out" of the AIRP. He did not do so. (*Ahmed*, 195 F.3d at 1132.) The Court ruled that Mr. Ahmed's receipt of the materials and his decision not to opt-out constituted an agreement affecting "terms and conditions of employment," creating a contract of employment. (*Id.*)

Mr. Adams was hired in *October 1995*, some months after the AIRP was initiated. The six-page application he signed included a provision purporting to divert all claims and disputes to binding arbitration. (*Adams*, 194 F.3d at 1071.) Unlike Mr. Ahmed and other individuals employed when AIRP began, Mr. Adams was required to accept the program as a condition of being employed in the first place. The Ninth Circuit thus analyzed a different fact situation in *Adams*, finding that Circuit City's arbitration agreement itself set forth terms and conditions of employment, and thus was an employment contract. (*Id.*)

As Ms. Ingle argued in her motion to dismiss the appeal, *Adams*, not *Ahmed*, governed her case because she

was hired in *September 1996*. (Circuit City Petition, page 7.)[6]

b. MR. GILMER WAS NOT GOVERNED BY A CONTRACT OF EMPLOYMENT BETWEEN EMPLOYER AND EMPLOYEE

Circuit City argues that this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), held in effect that an arbitration agreement between employer and employee, standing alone, was not a contract of employment in the meaning of 9 U.S.C. § 1. Petitioner misstates the Court's reasoning. Justice White's footnote reads, in pertinent part:

> "The FAA requires that the arbitration clause being enforced be in writing. See 9 U.S.C. §§ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, *the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchange, not with Interstate*. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. . . . " (Emphasis added.)

Petitioner's contention that the agreement in this case is indistinguishable from the U-4 agreement in

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[6] Should the Court grant certiorari, it need not reach this issue to decide Question 1.

Gilmer is the opposite of Circuit City's argument below. Circuit City contended in its District Court papers and at oral argument that its agreement was materially different from the U-4. It submitted below that Ingle's job at Circuit City was so different from a securities' broker's that the Ninth Circuit's holding concerning the U-4 arbitration provision in *Duffield v. Robertson, Stephens & Co., supra* (see Appendix B to Circuit City's Petition), did not apply. (See Appendix 1, p. 8.)

At page 15, the petition misstates the holding in *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) by stating the Seventh Circuit did not find "the agreement to arbitrate to be 'an employment contract.' " To the contrary, *Michalski* did not address at all whether the agreement in question was a "contract[ ] of employment" within the meaning of 9 U.S.C. § 1.

VI. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. If the petition is granted, though, review should be limited to the First Question Presented.

Respectfully submitted,

MICHAEL H. CROSBY
Counsel of Record
D.F. Garrettson House
2366 Front Street
San Diego, California 92101
(619) 696-7330

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CATHERINE INGLE,	)	
PLAINTIFF,	)	99CV1297-S
- V -	)	SAN DIEGO, CALIFORNIA
CIRCUIT CITY,	)	AUGUST 30, 1999
DEFENDANT.	)	10:30 A.M.

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EDWARD J. SCHWARTZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
MICHAEL CROSBY, ESQ.
THE GARRETTSON HOUSE
2366 FRONT STREET
SAN DIEGO, CA 92101

FOR THE DEFENDANT:
DAVIS GRIMM & PAYNE
BY: REX DARRELL BERRY, ESQ.
1111 THIRD AVE., STE. 1865
SEATTLE, WA 98101

PAUL PLEVIN & SULLIVAN
BY: RICHARD PAUL, ESQ.
101 WEST BROADWAY, STE. 1330
SAN DIEGO, CA 92101

COURT REPORTER:
ISRAEL VAN BRAMER
(619) 696-0080

[2] P-R-O-C-E-E-D-I-N-G-S

DEPUTY CLERK: ITEM NUMBER ONE ON CALENDAR, CIVIL CASE 99-1297, CATHERINE INGLE VERSUS CIRCUIT CITY ON FOR HEARING DEFENDANT'S MOTION TO COMPEL ARBITRATION.

MR. BERRY: GOOD MORNING, YOUR HONOR.

I AM REX BERRY OF THE LAW FIRM OF DAVIS, GRIMM & PAYNE ON BEHALF Of DEFENDANT AND MOVING PARTY CIRCUIT CITY STORES, INC.

MR. CROSBY: MICHAEL CROSBY APPEARING ON BEHALF OF CATHERINE INGLE, THE PLAINTIFF.

THE COURT: ALL, RIGHT. MR. BERRY.

MR. BERRY: MAY IT PLEASE THE COURT, THE PURPOSE OF THIS MOTION THIS MORNING IS TO COMPEL ARBITRATION OF A DISPUTE BETWEEN THE PARTIES BASED ON A WRITTEN AGREEMENT OF THE PARTIES TO ARBITRATE PRECISELY THESE TYPES OF DISPUTES.

MISS INGLE HAS FILED A LAWSUIT AGAINST CIRCUIT CITY CONTRARY TO THE TERMS OF THAT AGREEMENT. THIS MOTION IS PRESENTED TO YOU PURSUANT TO THE FEDERAL ARBITRATION ACT TO COMPEL ARBITRATION OF A DISPUTE.

THE F.A.A. MAKES VALID, ENFORCEABLE AND IRREVOCABLE PRIVATE AGREEMENTS TO SUBMIT DISPUTES TO ARBITRATION. IT REQUIRES THIS COURT TO ENFORCE THAT AGREEMENT IN THE

SAME MANNER THAT THIS COURT MIGHT ENFORCE ANY OTHER SORT OF AGREEMENT.

THE FACTS LEADING TO THE OBLIGATION TO ARBITRATE [3] ARE LARGELY UNDISPUTED BY THE PARTIES, AT LEAST, THE FACTS THAT WE BELIEVE REQUIRE ARBITRATION.

IN SEPTEMBER, 1996, MISS INGLE SIGNED THE CIRCUIT CITY DISPUTE RESOLUTION AGREEMENT AS PART OF THE JOB APPLICATION PROCESS. THE AGREEMENT THAT SHE SIGNED STATES THAT THE PARTIES AGREE TO SETTLE VIA FINAL AND BINDING ARBITRATION ANY AND ALL EMPLOYMENT-RELATED LEGAL DISPUTES.

AT THAT TIME, MISS INGLE ALSO EXECUTED WITH THE DISPUTE RESOLUTION AGREEMENT AN ACKNOWLEDGMENT THAT SHE WAS RECEIVING AND THAT SHE WOULD REVIEW THE DISPUTE RESOLUTION RULES AND PROCEDURES, THAT IS, THE RULES THE PARTIES AGREED TO USE FOR PURPOSES OF THE ARBITRATION.

THE DISPUTE RESOLUTION AGREEMENT STATED THAT SHE HAD RECEIVED AND WOULD READ THE DISPUTE RESOLUTION RULES AND PROCEDURES, OR THAT SHE MUST ASK FOR A COPY OF THEM PRIOR TO SIGNING THE AGREEMENT IF SHE WASN'T GIVEN ONE.

AT THAT POINT, MISS INGLE HAD A CHOICE. SHE HAD A CHOICE WHETHER TO VOLUNTARILY AGREE TO BINDING ARBITRATION OR ELSE SHE HAD A THREE-DAY PERIOD AFTER SUBMISSION OF

HER APPLICATION WITHIN WHICH SHE COULD WITHDRAW HER CONSENT TO ARBITRATION, WITHDRAW THE APPLICATION, AND PURSUE EMPLOYMENT WITH SOME OTHER ELECTRONICS RETAILER.

THE DISPUTE RESOLUTION AGREEMENT REQUIRES ARBITRATION OF THIS PARTICULAR DISPUTE BASED ON LEGAL CLAIMS BROUGHT BY MISS INGLE. SHE IS SUING FOR SEXUAL HARASSMENT [4] ARISING OUT OF HER EMPLOYMENT, EMPLOYMENT DISCRIMINATION BASED ON GENDER AND HANDICAP, RETALIATION AND FAILURE TO ACCOMMODATE A PHYSICAL DISABILITY.

NOW, CIRCUIT CITY, OF COURSE, DENIES EACH ONE OF THESE CLAIMS. BUT THE MERITS OF THOSE CLAIMS ARE TO BE ADDRESSED AND DETERMINED BY AN UNBIASED ARBITRATOR CHOSEN BY THE PARTIES WITH EQUAL SELECTION RIGHTS.

AS OF THE PRESENT COUNT, YOUR HONOR, 16 UNITED STATES DISTRICT COURTS AND TWO STATE COURTS HAVE ENFORCED THE DISPUTE RESOLUTION AGREEMENT AND EITHER STAYED OR DISMISSED LITIGATION BROUGHT CONTRARY TO THE DISPUTE RESOLUTION AGREEMENT; AND THAT INCLUDES ALL SEVEN CALIFORNIA FEDERAL COURTS THAT HAVE ADDRESSED THE ISSUE.

IN FACT, EVERY CALIFORNIA FEDERAL COURT THAT HAS ADDRESSED THE ISSUE HAS ENFORCED THE DISPUTE RESOLUTION AGREEMENT; ONE TIME OUT OF THE NORTHERN DISTRICT OF CALIFORNIA, FOUR TIMES OUT OF THE CENTRAL DISTRICT OF

CALIFORNIA AND TWICE OUT OF THE EASTERN DISTRICT OF CALIFORNIA.

NOW, ON FRIDAY AFTERNOON, I BROUGHT TO THE COURT'S ATTENTION A NEW DECISION THAT WE HAVE JUST RECEIVED FROM THE SOUTHERN DISTRICT OF OHIO, ANOTHER FEDERAL COURT, ENFORCING THE DISPUTE RESOLUTION AGREEMENT AND ADDRESSING VERY – IN A VERY SIMILAR FASHION MANY OF THE CLAIMS NOW RAISED BY MISS INGLE.

[5] THIS CASE PRESENTS THE FIRST OPPORTUNITY FOR THE SOUTHERN DISTRICT OF CALIFORNIA TO JOIN THOSE REMAINING CALIFORNIA DISTRICTS.

IN OPPOSITION, MISS INGLE HAS RAISED A NUMBER OF ARGUMENTS. THE FIRST SHE RAISED IS THE CLAIM THAT SHE NEVER SAW THE DISPUTE RESOLUTION AGREEMENT, DIDN'T READ THE DISPUTE RULES AND PROCEDURES, WHEN, IN FACT, YOUR HONOR, THE RECORD SHOWS THAT MISS INGLES SIGNED THE DISPUTE RESOLUTION AGREEMENT. IT HAS HER SIGNATURE ON IT.

AND THAT AGREEMENT SAYS, I HAVE RECEIVED THE DISPUTE RESOLUTION RULES AND PROCEDURES AND I AGREE TO READ THEM, AND IF I DON'T HAVE THEM, I AGREE TO ASK FOR A COPY OF THEM BEFORE I SIGN THIS DOCUMENT.

EVEN IF MISS INGLE DID NOT READ THE AGREEMENT, THAT FAILURE WILL NOT EXCUSE HER OBLIGATION TO ARBITRATE. AND THAT'S SET

FORTH IN THE *COHEN VERSUS WEBB BUSH NOBLE & COOK* CASE OUT OF THE NINTH CIRCUIT, WE CITED, AS WELL AS JUDGE JONES' RECENT OPINION IN THE *GOLENIA VERSUS BOB BAKER TOYOTA* CASE.

MISS INGLE NEXT ARGUES THAT J.A.M.S AND A.A.A. WILL NOT ENFORCE THE DISPUTE RESOLUTION AGREEMENT. AS A PRELIMINARY MATTER, WE DON'T THINK THERE'S ANY EVIDENTIARY BASIS FOR THAT OTHER THAN THE HEARSAY STATEMENT OF COUNSEL, BUT THE FACT IS, THE ASSERTION IS SIMPLY WRONG.

A.A.A. HAS, IN FACT, PROVIDED ARBITRATORS FOR 13 [6] SEPARATE ARBITRATIONS UNDER THE DISPUTE RESOLUTION RULES AND PROCEDURES; AND THAT'S SET FORTH IN THE DECLARATION OF MISS PARSONS THAT WE'VE SUBMITTED TO YOU.

J.A.M.S., TO OUR KNOWLEDGE, HAS NEVER BEEN ASKED TO SUBMIT ARBITRATORS FOR DISPUTE RESOLUTION.

THE ARGUMENT IN LARGE PART IS IRRELEVANT IN ANY EVENT, YOUR HONOR, BECAUSE THE DISPUTE RESOLUTION AGREEMENT ALLOWS THE PARTIES TO CHOOSE THEIR OWN ARBITRATOR. IT DOESN'T HAVE TO BE AN A.A.A. ARBITRATOR. IT DOESN'T HAVE TO BE A J.A.M.S ARBITRATOR.

THERE IS A DEFAULT VENDOR BY THE NAME OF RESOLUTE SYSTEMS THAT'S WELL KNOWN THROUGHOUT THE COUNTRY. BUT EVEN IF THE

PARTIES DON'T WANT A RESOLUTE SYSTEMS ARBITRATOR, THEY CAN AGREE TO AN ARBITRATOR AMONG THEMSELVES.

MISS INGLE NEXT CONTENDS THAT THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO EMPLOYMENT CONTRACTS; AND FOR THAT, SHE CITES THE NINTH CIRCUIT'S DECISION IN *KRAFT VERSUS CAMPBELL'S SOUP*.

AS WE'VE STATED, *KRAFT* DOESN'T HAVE ANY APPLICATION TO THIS CASE BECAUSE THE ARBITRATION AGREEMENT IS NOT PART OF AN EMPLOYMENT CONTRACT. IT IS A SEPARATE, STAND-ALONE AGREEMENT EXECUTED AT THE TIME OF HIRE.

IT APPLIES NOT ONLY TO EMPLOYEES. IT APPLIES TO APPLICANTS. IT APPLIES TO FORMER EMPLOYEES. SO IT IS NOT PART AND PARCEL OF AN EMPLOYMENT CONTRACT.

[7] THIS DISTINCTION WAS RECOGNIZED VERY RECENTLY BY DISTRICT JUDGE STOTLER IN THE CENTRAL DISTRICT IN THE *NODGE* DECISION THAT WE SUBMITTED TO YOU.

MISS INGLE NEXT ARGUES THAT THE NINTH CIRCUIT'S DECISION IN *DUFFIELD* WOULD PREVENT ARBITRATION OF THIS DISPUTE, OR AT LEAST, THE TITLE SEVEN ASPECTS OF THIS DISPUTE.

SINCE *DUFFIELD* WAS ISSUED IN MAY OF 1998, THREE CALIFORNIA DISTRICT COURTS HAVE CONTINUED TO UPHOLD THE DISPUTE RESOLUTION AGREEMENT.

DUFFIELD'S ONLY APPLICATION CONCEIVABLY COULD BE TO CLAIMS BROUGHT PURSUANT TO TITLE SEVEN OF THE CIVIL RIGHTS ACT OF 1964 BECAUSE CALIFORNIA COURTS HAVE STATED THAT AS FAR AS THE CALIFORNIA ANTI-DISCRIMINATION STATUTES GO, *DUFFIELD* HAS NO APPLICATION.

OUR POSITION IS THAT THIS LAWSUIT DOES NOT GO TO ANY VALID TITLE SEVEN CLAIMS, THAT THE PLAINTIFF HAS SIMPLY ATTEMPTED TO PLEAD AROUND, IF YOU WILL, THE RECENT DECISION OF DISTRICT JUDGE JONES WHICH DISMISSED THOSE SAME TITLE SEVEN CLAIMS AS BEING PROCEDURALLY FLAWED.

EVEN IF THOSE TITLE SEVEN CLAIMS WERE VALID, HOWEVER, *DUFFIELD* STILL WOULD NOT APPLY IN THIS CASE. THE NINTH CIRCUIT WAS CLEAR THAT ITS CONCERN IN *DUFFIELD* WAS OVER ARBITRATION AGREEMENTS THAT WERE, TO USE THE COURT'S TERM, "COMPULSORY IN EVERY SENSE OF THE WORD."

[8] IN *DUFFIELD*, THE CONCERN WAS THAT THE U-4 FORM THAT ALL BROKERS HAVE TO SIGN PRIOR TO BEING A BROKER IN THE UNITED STATES CONTAINS THE ARBITRATION CLAUSE. IF A PROSPECTIVE BROKER DID NOT FILL OUT THAT U-4 FORM REGISTRATION, THEY COULD NOT BE A BROKER ANYWHERE IN THE COUNTRY FOR ANY EMPLOYER. IT WAS TRULY COMPULSORY IN EVERY SENSE OF THE WORD.

BY CONTRAST, HERE, THE ARBITRATION AGREEMENT AT ISSUE IS NOT COMPULSORY IN EVERY

SENSE OF THE WORD. MISS INGLE, AS I SAID, HAD A CHOICE. SHE COULD DECIDE, I DON'T WANT TO BE PART OF THAT ARBITRATION PROGRAM. THEREFORE, I'M GOING TO GO DOWN THE STREET AND WORK FOR THE GOOD GUYS. I'M GOING TO WORK FOR SEARS. I'M GOING TO WORK FOR ANOTHER EMPLOYER THAT DOES NOT REQUIRE THAT.

MISS INGLE THEN CHALLENGES THE ARBITRATION AGREEMENT AS HAVING INADEQUATE SUBSTANTIVE RIGHTS AND REMEDIES. SHE SAYS THAT IN ORDER FOR THE DISPUTE RESOLUTION AGREEMENT TO BE ENFORCEABLE, THE AGREEMENT MUST EXACTLY MIRROR THE PROCEDURES OF LITIGATION AND HAVE EXACTLY THE SAME REMEDIES.

NO STATE OR FEDERAL CASE SO HOLDS, YOUR HONOR. IN FACT, THE SUPREME COURT HAS RECOGNIZED THAT THERE ARE DIFFERENCES INHERENT BETWEEN ARBITRATION AND LITIGATION IN TERMS OF THE FORMALITY, THE SPEED AND THE BINDING - FINAL AND BINDING EFFECT OF THE PROCESS.

[9] THOSE DIFFERENCES WERE RECOGNIZED WITH APPROVAL BY THE UNITED STATES SUPREME COURT IN THE *GILMER* DECISION AND ALSO IN *WRIGHT*.

THE RELEVANT QUESTION, YOUR HONOR, IS WHETHER A PARTY EFFECTIVELY MAY VINDICATE HIS OR HER STATUTORY RIGHTS UNDER THE ARBITRATION AGREEMENT. AS LONG AS THOSE ARBITRATION PROCEDURES ARE BASICALLY FAIR AND

REASONABLE, THE PARTIES CAN AGREE TO ANYTHING THEY CHOOSE.

HERE, WE THINK THE DISPUTE RESOLUTION AGREEMENT MORE THAN MEETS THAT TASK, AND WE THINK THAT 17 COURTS HAVE AGREED WITH US.

THE DISPUTE RESOLUTION AGREEMENT WORKS IN FAVOR OF THE ASSOCIATE IN A NUMBER OF WAYS. CIRCUIT CITY ADVANCES ALL THE COSTS OF ARBITRATION SUBJECT TO REALLOCATION BY THE ARBITRATOR.

AN ASSOCIATE CAN LIMIT HIS OR HER EXPOSURE FOR ARBITRATION COSTS TO ONLY THREE PERCENT OF THEIR MOST RECENT YEARLY INCOME. THAT IS, IF THE ASSOCIATE MADE $20,000 LAST YEAR, THEY CAN LIMIT THEIR TOTAL EXPOSURE FOR FEES RELATED TO ARBITRATION TO $600.

THE ASSOCIATE, IF THEY PREVAIL, THEIR FILING FEE IS RETURNED TO THEM. THAT DOESN'T HAPPEN IN COURT.

IF THE ASSOCIATE PREVAILS, EVEN ON A COMMON LAW CLAIM, A CLAIM OF SLANDER OR A CLAIM OF BREACH OF CONTRACT, THEY'RE ENTITLED TO RECOVER THEIR ATTORNEY'S FEES. THAT IS [10] SOMETHING NOT AVAILABLE TO THEM IN COURT AS WELL.

A MUCH LOWER THRESHOLD EXISTS FOR ASSOCIATES TO RECOVER THEIR ATTORNEY'S FEES THAN IS ALLOTTED TO THE EMPLOYER.

THE STATUTE OF LIMITATIONS IS EXTENDED FOR THE ASSOCIATE ON CERTAIN CLAIMS SUCH AS TITLE SEVEN CLAIMS. IT MATCHES THE AVAILABLE STATUTE OF LIMITATIONS UNDER MANY OF THE DISCRIMINATION STATUTES IN CALIFORNIA. IT ALSO MATCHES THE DISCRIMINATION STATUTE OF LIMITATIONS AVAILABLE UNDER SECTION 1981 IN CALIFORNIA.

ARBITRATION ALSO REMOVES THE ADMINISTRATIVE HURDLES THAT THE PLAINTIFF HAS TO GO THROUGH FOR PURPOSES OF BRINGING A TITLE SEVEN CLAIM. AS THE COURT WELL KNOWS, PRIOR TO BRINGING A TITLE SEVEN CLAIM, THE PLAINTIFF HAS TO FILE A CHARGE OF DISCRIMINATION WITH THE E.E.O.C., HAS TO OBTAIN A RIGHT-TO-SUE LETTER, THEN MAY GO TO COURT.

NONE OF THAT IS REQUIRED UNDER ARBITRATION. AND IN THIS PARTICULAR CASE, IT'S RELEVANT BECAUSE IT WAS THE FAILURE TO TIMELY FILE A CHARGE OF DISCRIMINATION AND RECEIVE THE RIGHT-TO-SUE LETTER THAT JUDGE JONES RELIED ON IN DISMISSING MISS INGLE'S TITLE SEVEN CLAIMS PREVIOUSLY.

NONE OF THOSE HURDLES WOULD BE PRESENT IN ARBITRATION. MISS INGLES COULD COME RIGHT INTO ARBITRATION AND ARBITRATE THAT TITLE SEVEN CLAIM.

THE ASSOCIATE HAS THE ABILITY TO RECOVER THE FULL [11] ARRAY OF RELIEFS, INJUNCTIVE RELIEF, BACK-PAY, FRONT-PAY, COMPENSATORY

DAMAGES WITHOUT LIMIT, PUNITIVE DAMAGES WITH SOME LIMITS, AND ATTORNEY'S FEES.

BOTH DISTRICT JUDGE LEGGE OUT OF THE NORTHERN DISTRICT AND DISTRICT JUDGE LEVI OUT OF THE EASTERN FOUND THE DAMAGE PROVISION OF THE DISPUTE RESOLUTION AGREEMENT TO BE ADEQUATE AND ENFORCEABLE.

ANY REMAINING ISSUES OF UNFAIRNESS OF THE PROCEDURES OR REMEDIES WE SUBMIT WOULD BE PROPERLY SUBMITTED TO THE ARBITRATOR, AND NOT TO THIS COURT.

THE PARTIES ARE MUTUALLY BOUND TO ARBITRATE THE ASSOCIATE'S CLAIMS AND HAVE AGREE TO BE BOUND BY THAT DECISION.

IN ESSENCE, MISS INGLE ADMITS SHE SIGNED THE DISPUTE RESOLUTION AGREEMENT. SHE DOESN'T DISPUTE THAT THIS IS AN EMPLOYMENT-RELATED LEGAL DISPUTE. THERE IS NO LEGAL NOR FACTUAL BASIS WHICH EXISTS PRECLUDING ENFORCEMENT OF THE PARTY'S AGREEMENT.

AND THUS, THIS COURT SHOULD DISMISS OR STAY THE LAWSUIT BEFORE IT AND COMPEL THE PARTIES TO ARBITRATE THIS DISPUTE.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

ALL RIGHT. MR. CROSBY.

MR. CROSBY: THANK YOU, YOUR HONOR.

[12] I'M GOING TO TRY TO FOCUS ON THE ISSUES NOT DISCUSSED THOROUGHLY IN THE BRIEFS OR BOUGHT UP IN REPLY OR HERE TODAY.

BUT FIRST, I'D LIKE TO FOCUS THE COURT ON WHAT REALLY IS AT ISSUE HERE, AND THAT IS WHAT CONGRESS INTENDED WITH RESPECT TO THE COMPULSORY ARBITRATION OF TITLE SEVEN AND STATE STATUTORY DISCRIMINATION ACTIONS.

AND IT SAID WHAT IT THOUGHT THROUGH A COMMITTEE TO THE HOUSE LABOR & EDUCATION COMMITTEE. AND THAT STATED, AND IT'S QUOTE – IT'S QUOTED IN *DUFFIELD* AT PAGE 1196: "AMERICAN WORKERS SHOULD NOT BE FORCED TO CHOOSE BETWEEN THEIR JOBS AND THEIR CIVIL RIGHTS." AND THAT'S THE KEY ISSUE HERE TODAY.

WHAT THE CONGRESS INTENDS, THAT WAS THE FOCUS OF THE *DUFFIELD* CASE. AND IT CLEARLY CONCLUDED – AND THE NINTH CIRCUIT IS CLEAR ON THIS – THAT AN EMPLOYEE CANNOT BE COMPELLED AT THE OUTSET AS A CONDITION OF EMPLOYMENT TO ARBITRATE DISPUTES THAT MAY ARISE IN THE FUTURE, DISPUTES RELATING TO TITLE SEVEN OR D.F.E.H. CLAIMS.

IN THAT RESPECT, YOUR HONOR, THE DEFENSE HAS ARGUED THAT D.F.E.H. CLAIMS, F.E.H.A. CLAIMS ARE NOT SUBJECT TO ARBITRATION, AT LEAST, NOT COMPELLED BY THE *DUFFIELD* CASE. THAT IS NOT WHAT *DUFFIELD* SAYS.

IT SAYS JUST THE OPPOSITE. IT SAYS THAT THE NINTH CIRCUIT HAS SAID, BOTH IN THE *PRUDENTIAL VERSUS LAI* CASE AND [13] IN *DUFFIELD* THAT CONGRESS HAS MADE – HAS STATED IN TITLE SEVEN THAT STATE DISCRIMINATION STATUTES SUCH AS F.E.H.A. ARE INCORPORATED AS PART OF THE MECHANISM ANTICIPATED BY CONGRESS BACK IN 1964 FOR THE RESOLUTION OF DISPUTES ARISING FROM CIVIL RIGHTS, FROM EMPLOYMENT DISCRIMINATION; AND IN TWO PLACES IN THE *DUFFIELD* CASE, INCLUDING AT THE VERY END OF THE CASE, ON PAGE 1203, THAT D.F.E.H. CLAIMS AS WELL AS TITLE SEVEN CLAIMS ARE NOT SUBJECT TO COMPULSORY ARBITRATION.

I'D LIKE TO FOCUS ON SOME UNDISPUTED FACTS HERE, FACTS THAT HAVE NOT BEEN CONTRAVENED BY CIRCUIT CITY: ONE, THAT CATHERINE INGLE WAS PREVENTED FROM READING THE AGREEMENT.

THAT WAS STATED IN HER DECLARATION. IT'S WHAT SHE'LL SAY IN HER DEPOSITION. AND THAT MEANS THAT THERE WAS NOT A KNOWING WAIVER UNDER THE STANDARDS OF THE NINTH CIRCUIT SET FORTH IN CASES LIKE *PRUDENTIAL VERSUS LAI.*

SECOND, AND THIS IS EXTREMELY IMPORTANT AND I WILL ADMIT, I DID NOT ADDRESS IT DIRECTLY IN THE BRIEF. INGLE NEVER RECEIVED NOTICE THAT THERE WAS A CHANGE OF THE RULES. SHE SIGNED THEIR EXHIBIT A. BUT SHE NEVER SAW OR SIGNED OR COULD HAVE SEEN OR

SIGNED EXHIBIT B BECAUSE IT WAS NOT IN EXISTENCE WHEN SHE WAS HIRED AND WHEN SHE SIGNED THIS.

EXHIBIT B, AS I SAID, THEY'RE SLIPPING THIS IN HERE AS IF IT'S PART OF THE CASE. IT IS NOT. EXHIBIT A THAT SHE SIGNED, THE APPLICATION, SAID THAT WE MAY CHANGE OUR RULES IN [14] THE FUTURE UPON 30 DAYS NOTICE.

THERE IS NO EVIDENCE, YOUR HONOR, IN THE RECORD THAT THEY EVER GAVE 30 DAYS NOTICE TO ANYONE, MUCH LESS MISS INGLE, OR ANYONE IN THE STORE IN WHICH SHE WORKED.

SO THEIR ENTIRE MOTION TO COMPEL FALLS ON THAT EVEN IF THE COURT WERE GOING TO CONSIDER IT ON OTHER GROUNDS, BECAUSE THE RULES DO NOT GO INTO EFFECT ACCORDING TO THEIR OWN CONTENT.

THIRD, THIS WAS RAISED IN A NUMBER OF THE CASES, AND I DON'T THINK THAT THE COURT IS GOING TO RECOGNIZE CIRCUIT CITY'S REPRESENTATION OF 17 ORDERS OR EVEN THE ORDERS THAT ARE BEFORE THE COURT. I THINK THOSE ARE OUT OF CONTEXT AND I'VE STATED WHY I DON'T THINK THEY SHOULD BE CONSIDERED.

AND I'VE ALSO POINTED OUT AND I THINK IT'S OBVIOUS, WE DON'T KNOW HOW MANY COURTS HAVE NOT ENFORCED CIRCUIT CITY'S AGREEMENT. THEY HAD AN OPPORTUNITY TO TELL US IN THE

DECLARATION OF PARSONS, IN THE SUPPLEMENTAL DECLARATION OF PARSONS, OR SOME DECLARATION OF MR. BERRY OR SOME DECLARATION OF IN-HOUSE COUNSEL, MR. HOSEY OR SOMEONE ELSE. WE HAVEN'T SEEN THAT.

WE KNOW THAT THE *DERRICKSON* CASE RULED AGAINST IT. THERE'S A CASE HERE IN THIS COURT IN THE SOUTHERN DISTRICT THAT HAS RULED AGAINST IT AND THEY HAVE CALLED – IT'S ALSO AGAINST CIRCUIT CITY, *JEANNIE KOONS VERSUS CIRCUIT CITY*. I'M NOT SURE OF ITS CURRENT STATUS BUT I KNOW THAT THE INITIAL [15] TWO RULINGS WERE NOT TO ENFORCE.

BUT THE POINT IS THIS: THE COURT CANNOT RELY ON SORT OF A PIG-IN-THE-POKE KIND OF ARGUMENT LIKE THAT.

IN THOSE CASES THOUGH, MANY OF THEM RELIED UPON THE OPPORTUNITY OF THE EMPLOYEE TO OPT OUT OF THE PROGRAM. MISS INGLE DID NOT EVER HAVE THAT OPPORTUNITY.

A COUPLE OF OTHER THINGS, THE A.A.A. ISSUE THAT WAS RAISED, I THINK THAT THE MOST REASONABLE CONCLUSION, YOUR HONOR, BASED UPON A.A.A.'S POSITION IN THIS CASE IS THAT THE CASES THAT IT'S ARBITRATED WERE BEFORE A.A.A. ISSUED ITS RULES SO THEY WOULD ONLY ADMINISTER UNDER THE DUE PROCESS PROTOCOL THAT'S BEEN PROVIDED WITH THE PAPERS.

I REALLY – I KNOW THAT THE ONE HERE LOOKED AT CIRCUIT CITY'S RULES AND SAID, NO,

IT'S INSUFFICIENT. THEY ARE INSUFFICIENT DUE PROCESS GUIDELINES.

ONE CASE THAT'S FAIRLY IMPORTANT, A NINTH CIRCUIT CASE, AGAIN, THAT HASN'T BEEN DEALT WITH, THE *GRAHAM OIL*. THAT STATES, FOR EXAMPLE, TRUNCATING THE STATUTE OF LIMITATIONS – WHICH I UNDERSTAND THEY CLAIM IT DOES NOT DO, BUT THEY'RE INCORRECT.

IT STATES THAT THAT'S ENOUGH TO END THE INQUIRY. THERE ARE JUST ANY NUMBER OF DEFICIENCIES OUTLINED IN THE BRIEF THAT I BELIEVE IN AND OF THEMSELVES ARE ENOUGH FOR THE CASE NOT TO BE ARBITRATED, TO FORCE ARBITRATION.

THE CLEAREST ONES ARE THE COST. THE FACT IS, MISS [16] INGLE DOES NOT HAVE TO PAY TO COME HERE. SHE DOES HAVE TO PAY IF SHE FOLLOWS CIRCUIT CITY'S RULES, IF SHE ARBITRATES UNDER CIRCUIT CITY'S RULES. AND THAT'S A REAL, REAL IMPORTANT DISTINCTION.

THE CASES *PALADINO, COLE, SHANKEL,* I THINK ARE LOOKING AT IT THE RIGHT WAY. THIS IS CHECK – THEY'RE TALKING CHECKBOOK JUSTICE. THEY CLAIM THEIR PEOPLE HAVE TO BE WILLING TO PAY MAYBE A LITTLE, MAYBE A LOT, BUT HAVE TO BE WILLING TO PAY WAY BEYOND A FILING FEE TO GET JUSTICE. AND I DON'T KNOW HOW TO DEAL WITH THAT OTHER THAN SAYING, THAT'S NOT THE AMERICAN WAY.

I THINK THAT IT'S IMPORTANT EVERY COUPLE OF MINUTES IN THIS CASE TO GO BACK TO THE BIG PICTURE; THAT IS TWO THINGS. THEY'RE MAKING A PERSON, A FORMER CHILIES WAITRESS WHO GETS A GOOD JOB AS A SALESPERSON AT CIRCUIT CITY – THEY'RE MAKING HER PAY FOR JUSTICE. IF SHE CAN'T PAY, NO JUSTICE.

SECOND, THEY WANT THE RIGHT TO WITHDRAW FROM THE AMERICAN SYSTEM OF JUSTICE: JUST PULL OURSELVES OUT. THEY DON'T WANT TO WORK FOR US, OKAY. BUT IF SOMEBODY'S GOING TO WORK FOR US, THEY'RE GOING TO WORK UNDER SOME OTHER SYSTEM OF JUSTICE.

I THINK THAT THE IMPACT OF THAT IS INESTIMABLE. AND THAT'S WHY I'M RATHER – I REMAIN SURPRISED THE COURT'S HAVE TAKEN A DIFFERENT POSITION, BUT I THINK THAT IN THE [17] NINTH CIRCUIT, WE CANNOT TAKE THAT POSITION. THE NINTH CIRCUIT HAS NOT TAKEN THAT POSITION.

SOME ISSUES RAISED BY MR. BERRY IN HIS ABLE PRESENTATION, I THINK THAT *KRAFT*, A NINTH CIRCUIT EN BANC DECISION – EXCUSE ME – PER CURIAM DECISION, THEY DECLINED TO SEND IT EN BANC – RELATES TO EMPLOYMENT CONTRACTS. OBVIOUSLY, THIS IS PART OF AN EMPLOYMENT CONTRACT.

THE LITTLE GLITCH OR CATCH HERE IS THAT IT MAY BE ONE THAT'S TERMINABLE AT THE WILL OF THE PARTIES. BUT A TERMINABLE, AT-WILL CONTRACT IS A CONTRACT.

AND *KRAFT* STATES THAT THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO EMPLOYMENT CONTRACTS, FLAT-OUT DOESN'T APPLY. THEY SAID THEY'RE COMING HERE UNDER F.A.A., AND UNDER THE NINTH CIRCUIT RULING IN *KRAFT*, THEY'RE OUT.

I THINK I HAVE DEALT WITH THE ISSUE OF THE SUBSTANTIVE RULES AND WON'T GO INTO THEM AGAIN.

WITH RESPECT TO *DUFFIELD*, THERE IS ABSOLUTELY NOTHING IN *DUFFIELD* THAT INDICATES THAT IT ONLY APPLIES TO THE U-4 AGREEMENT. *DUFFIELD'S* HOLDING ON THE FACTS ARE THAT U-4 IS NOT ENFORCEABLE BECAUSE IT REQUIRES THE ARBITRATION OF TITLE SEVEN AND D.F.E.H. CLAIMS. THAT'S THE REASON THAT IT'S UNENFORCEABLE, NOT BECAUSE IT GOES TO LICENSURE, ALTHOUGH CERTAINLY, THAT IS DISCUSSED.

THE COURT: WHAT ABOUT THE CONTENTION THAT *DUFFIELD* IS RESTRICTED TO A SITUATION, WHEREAS IN THAT CASE, IT [18] APPLIES UNIVERSALLY TO ALL PROSPECTIVE EMPLOYEES?

MR. CROSBY: I THINK THAT – I THINK THAT IF YOU WERE TO TAKE THE POSITION THAT THAT'S ALL THAT *DUFFIELD* APPLIES TO, I THINK YOU HAVE TO STEP BACK FOR A SECOND AND LOOK.

THE FOCUS OF THE *DUFFIELD* IS NOT THE U-4. THE FOCUS OF *DUFFIELD* IS THE LEGISLATIVE HISTORY OF THE 1991 CIVIL RIGHTS ACT AMENDMENTS. AND THE 1991 CIVIL RIGHTS ACT

AMENDMENTS, PARTICULARLY, SECTION 118, THEY DON'T SAY THAT THEY APPLY ONLY TO THE SECURITIES INDUSTRY OR ONLY TO INDUSTRIES WHICH REQUIRE LICENSURE OR ONLY INDUSTRIES WHERE YOU CAN'T GO TO SOME OTHER CASE.

SO THE FOCUS ON THE PARTICULAR FACTS OF *DUFFIELD* IS MISPLACED. THE PROPER FOCUS IS ON: WHAT DID CONGRESS INTEND? AND CONGRESS INTENDED THAT NO EMPLOYEE SHOULD HAVE TO WAIVE THEIR CIVIL RIGHTS TO GET A JOB. THEY STATED THAT.

THE COURT: THANK YOU.

MR. CROSBY: THANK YOU.

THE COURT: ANYTHING FURTHER, BRIEFLY, MR. BERRY?

MR. BERRY: ONLY IF THERE SPECIFIC QUESTIONS THAT THE COURT HAS.

THE ONLY OBSERVATION THAT I WOULD MAKE, YOUR HONOR, SIMPLY COMES FROM THE LANGUAGE OF THE AGREEMENT THAT WAS SIGNED BY MISS INGLE.

IT SAYS, "INCLUDED WITH THIS APPLICATION IS THE [19] CIRCUIT CITY DISPUTE RESOLUTION RULES AND PROCEDURES. YOU SHOULD FAMILIARIZE YOURSELF WITH THESE RULES AND PROCEDURES PRIOR TO SIGNING THIS AGREEMENT.

"IF THE RULES AND PROCEDURES ARE NOT INCLUDED IN THIS BOOKLET, YOU MUST REQUEST

A COPY FROM A CIRCUIT CITY REPRESENTATIVE PRIOR TO SIGNING THE AGREEMENT.

"YOU WILL NOTE THAT IF YOU SIGN AT THIS TIME, YOU DO HAVE THREE DAYS TO WITHDRAW YOUR CONSENT. YOU MAY, OF COURSE, TAKE THE PACKAGE WITH YOU AND RETURN IT SIGNED IF YOU WISH TO CONTINUE THE PROCESS."

AND THEN DIRECTLY ABOVE HER SIGNATURE, "I HAVE READ THIS AGREEMENT AND I UNDERSTAND THAT I SHOULD READ THE DISPUTE RESOLUTION RULES AND PROCEDURES OVER THE NEXT FEW DAYS."

MISS INGLE, AS I SAID, HAD A CHOICE. SHE AGREED TO ARBITRATE. AND WE'RE ASKING THE COURT TO ENFORCE THAT AGREEMENT OF THE PARTIES.

THANK YOU.

THE COURT: THANK YOU.

WELL, IN THIS CASE, THE DEFENDANT, CIRCUIT CITY, HAS FILED A MOTION TO COMPEL ARBITRATION OF THE PLAINTIFF'S CLAIMS UNDER THE FEDERAL ARBITRATION AGREEMENT.

OF COURSE, THIS IS A SUBJECT THAT'S BEEN THE FOCUS OF A GOOD MANY COURT DECISIONS IN VARIOUS JURISDICTIONS. WE HAVE HAD DISTRICT COURTS RULE ON IT.

[20] BUT I THINK IN THE NINTH CIRCUIT, WE NOW HAVE THE CASE OF *DUFFIELD VERSUS ROBERTSON STEVENS & COMPANY*, WHICH IS 144

FED 3D 1182, IN WHICH THE COURT HELD THAT AN EMPLOYER MAY NOT CONDITION EMPLOYMENT ON A WAIVER OF JUDICIAL REMEDIES UNDER TITLE SEVEN.

IN THIS CASE, WHEN ONE EXAMINES THE EMPLOYMENT APPLICATION, ONE FINDS IN PARAGRAPH TWO THEREOF THE FOLLOWING LANGUAGE: "THIS AGREEMENT REQUIRES YOU TO ARBITRATE. CERTAIN LEGAL DISPUTES RELATED TO YOUR APPLICATION FOR EMPLOYMENT OR EMPLOYMENT WITH CIRCUIT CITY."

NOW, I THINK IF IT HAD STOPPED THERE, THERE WOULD BE NO PROBLEM IN THIS CASE. BUT PARAGRAPH TWO OF THE EMPLOYMENT APPLICATION GOES ON, "CIRCUIT CITY WILL NOT CONSIDER YOUR APPLICATION UNLESS THIS AGREEMENT IS SIGNED."

NOW, THAT PLACES A PROSPECTIVE EMPLOYEE IN A RATHER DIFFICULT SITUATION. IF HE WANTS A JOB, IT MAY BE A JOB THAT'S PARTICULARLY FAVORABLE TO HIS SITUATION AND HIS QUALIFICATIONS, HE'S GOT TO, AS A COMPULSORY MATTER, AGREE TO WAIVE HIS RIGHT TO ORDINARY LITIGATION AND TO GO BEFORE AN ARBITRATOR WITH CERTAIN PROBLEMS THAT EXIST IN AN ARBITRATION SITUATION AS DISTINGUISHED FROM A PROCEEDING IN A FEDERAL COURT.

DUFFIELD DID INVOLVE A COMPULSORY ARBITRATION AGREEMENT WHICH CONDITIONED EMPLOYMENT ON THE WAIVER OF THE RIGHT TO

LITIGATE FUTURE EMPLOYMENT-RELATED DISPUTES.

[21] IN THIS CASE, THE DEFENDANT IS RELYING ON THE DISPUTE RESOLUTION AGREEMENT THAT THE PLAINTIFF SIGNED AS PART OF HER APPLICATION FOR EMPLOYMENT WHICH STATES THAT ANY FUTURE CLAIMS MUST BE ARBITRATED.

THE EMPLOYMENT APPLICATION, AS I HAVE INDICATED, EXPLICITLY STATED, PLAINTIFF WOULD NOT BE CONSIDERED FOR THE JOB UNLESS SHE SIGNED THE D.R.A.

I THINK THIS IS A COMPULSORY ARBITRATION AGREEMENT WITHIN THE DEFINITION OF *DUFFIELD*.

IF ONE EXAMINES THE *DUFFIELD* DECISION AT PAGE 1199, THE FOLLOWING LANGUAGE APPEARS: "IN VIEW OF THE FACT THAT THE CONTEXT, LANGUAGE AND LEGISLATIVE HISTORY OF THE 1991 ACT, TOGETHER, MAKE OUT A CONCLUSIVE CASE THAT CONGRESS INTENDED TO PRECLUDE COMPULSORY ARBITRATION OF TITLE SEVEN CLAIMS, WE THINK IT INESCAPABLE THAT FORM U-4 IS UNENFORCEABLE AS APPLIED TO SUCH CLAIMS.

"FORM U-4 COMPELS PRECISELY WHAT CONGRESS INTENDED TO PROHIBIT IN THE 1981 ACT, MANDATORY REQUIREMENTS UNDER WHICH PROSPECTIVE EMPLOYEES AGREE, AS A CONDITION OF EMPLOYMENT, TO SURRENDER THEIR RIGHTS TO LITIGATE FUTURE TITLE SEVEN CLAIMS IN A JUDICIAL FORUM AND ACCEPT ARBITRATION INSTEAD."

I THINK THAT IS THE VICE OF THE SITUATION THAT WE HAVE BEFORE US, THAT THIS WAS NOT SOMETHING THAT A PROSPECTIVE EMPLOYEE COULD EITHER AGREE TO OR WALK AWAY [22] FROM.

UNDER THE CIRCUMSTANCES, I THINK IT PLACED UPON A PROSPECTIVE EMPLOYEE, WHO PROBABLY SORELY WANTS THE JOB, A DECISION TO EITHER AGREE WILLY-NILLY, RELUCTANTLY, OR TO SIMPLY LAY DOWN AND ACCEPT A COMPULSORY ARBITRATION PROVISION.

ACCORDINGLY, THE MOTION BY THE DEFENDANT IS DENIED.

MR. CROSBY, WILL YOU PREPARE AN APPROPRIATE ORDER AND SUBMIT IT TO OPPOSING COUNSEL FOR APPROVAL AS TO FORM?

MR. CROSBY: I WILL, YOUR HONOR. THANK YOU.

MR. BERRY: THANK YOU, YOUR HONOR.

WOULD THE COURT BE WILLING TO HEAR JUST ONE MORE POINT?

THE COURT: WELL, ONE MORE POINT. HOW LONG A POINT IS IT?

MR. BERRY: IT WILL BE BRIEF.

THE COURT: ALL RIGHT.

MR. BERRY: I WOULD LIKE THE COURT TO CONSIDER THE APPLICATION OF *DUFFIELD* ONLY TO THE TITLE SEVEN CLAIM AS OPPOSED TO THE

REMAINING CLAIMS IN THE LAWSUIT. I THINK THE CALIFORNIA COURTS HAVE BEEN VERY CLEAR THAT THEY DON'T AGREE THAT *DUFFIELD* HAS ANY APPLICATION TO F.E.H.A. CLAIMS BROUGHT UNDER CALIFORNIA LAW.

THE COURT: WELL, I DON'T THINK THAT IS A NECESSARY [23] RESULT OF *DUFFIELD*, AND I DON'T THINK THE POSITIONS OF THE CALIFORNIA COURTS ARE BINDING ON THIS COURT.

THANK YOU.

MR. BERRY: THANK YOU, YOUR HONOR.

MR. CROSBY: THANK YOU, YOUR HONOR.

THE COURT: INCIDENTLY, COUNSEL, HAVE THERE BEEN SETTLEMENT NEGOTIATIONS IN THIS MATTER?

MR. BERRY: THERE HAVE NOT, YOUR HONOR.

THE COURT: LET'S SEE, WHO IS THE MAGISTRATE JUDGE?

MR. CROSBY: JUDGE STIVEN.

THE COURT: JUDGE STIVEN. I THINK IT MIGHT NOT BE AMISS FOR YOU, SINCE YOU'RE BOTH HERE, TO STOP DOWN AT JUDGE STIVEN'S CHAMBERS AND SEE IF YOU CAN'T ARRANGE A SETTLEMENT NEGOTIATION WITH HIM.

MR. BERRY: THANK YOU, YOUR HONOR.

MR. CROSBY: THANK YOU.

* * *

(HEARING RECESSED AT 11:05 A.M.)

REPORTER'S CERTIFICATE

I, ISRAEL VAN BRAMER, CERTIFY THAT THE FOREGOING IS THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER; AND THAT IT IS COMPLETE AND ACCURATE, TO THE REST OF MY KNOWLEDGE AND ABILITY.